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No. 81-2216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LAURA M. BYRD, PETITIONER

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
RESPONDENT

REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PETITION FOR WRIT

Defendant-respondent asserts in its Opposition to Plaintiff's Petition for Writ that "[p]laintiff does not contend that the courts below failed to apply the legal standard appropriate to a Title VII disparate treatment case" and that plaintiff "quarrels with the results...reached in applying that standard to the evidence." [Defendant's Opposition to Plaintiff's Petition for Writ, at 4.] Defendant has misconstrued the thrust of Plaintiff's Petition in that plaintiff asserts that the standard applied by the trial court was inappropriate because the trial court refused to acknowledge the inherent flexibility of the standard established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a refusal which places the court in diametric opposition to the progression of Supreme Court Title VII

decisions. A strict form of the McDonnell Douglas standard, as applied to the instant case, is perhaps more appropriate to a single event, for instance a single failure to hire, but the manifestation of that standard in later cases such as Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), lends itself to more complex patterns of facts and events. In Burdine, the Court required that the plaintiff demonstrate an adverse employment decision "under circumstances which give rise to an inference of unlawful discrimination." Id., 450 U.S. at 253 (footnote omitted).

Further, plaintiff asserts that this strict application of McDonnell Douglas controlled the flow of evidence to the prejudice of plaintiff's claims, and thus necessarily gave rise to erroneous conclusions of fact and law. Specifically, plaintiff complains that the trial court

viewed plaintiff's attempt to establish a prima facie case only from the all too narrow perspective of the denial of the rescission of plaintiff's leave of absence. In viewing this single event as an isolated act, the trial court refused to consider the previous acts committed by the defendant against the plaintiff, which led to, and in fact preordained, the defendant's decision to deny her request for rescission. The essential error of the court is most easily demonstrated in the context of the issue of a vacancy, on which the court rested its conclusion that plaintiff failed to make a prima facie case (Plaintiff's Petition, Appendix B, at 26a), and on the issue of pretext, which the trial court also found plaintiff had failed to establish (Id., at 28a).

The Vacancy Argument

The trial court found and defendant contends that plaintiff failed to establish a prima facie case because "[n]o inference of discrimination arose in this case sufficient to shift the burden of producing evidence to the District because there was no vacancy for which plaintiff could be considered." [Opposition, at 5]. Under the unique facts of plaintiff's case, the acts and policies of the defendant itself prevented a vacancy from ever arising under traditionally recognized meanings of the term, and therefore any rigid, narrow application of the standard would allow any defendant to evade its duties under civil rights laws by a convenient prearrangement of the facts. Surely it is this very manipulation of facts and circumstances characteristic of the most invidious forms

of discrimination that the Supreme Court has determined to eradicate in two decades of landmark decisions.

More specifically, both the defendant and the trial court erroneously focused their attention solely on the defendant's refusal to rescind the plaintiff's leave of absence which was the culmination of a series of discriminatory actions. The trial court should have focused on the prior adverse actions, which made the defendant's refusal inevitable, as well as the ultimate decision on her request to rescind her leave. Before plaintiff's request for a leave of absence was acted upon by the Board of Education and while plaintiff was still a full time staff member, defendant removed her name from the fall schedule, disassembled plaintiff's sequence of assignments, and selected a white teacher with less seniority to cover the remaining needs of

the department. Thus, no vacancy, under the traditional meaning of the word, ever arose; defendant dissolved plaintiff's position around her.

Moreover, plaintiff's principal notified the staff administrator that he had written her out of the program and that there would not be a position for her at the school in the fall. In reply, the staff administrator made an absolute commitment to the principal that should the plaintiff apply for rescission she would be prevented from returning to the system, under any circumstances and regardless of the needs of the District. This commitment was made without notice to the Board empowered to make such decisions and without notice to the plaintiff that an adverse employment decision had been made.

In this wider context, the requirement that plaintiff demonstrate the presence of a vacancy is plainly irrele-

vant. Further, the trial court's companion finding, that plaintiff failed to demonstrate that "no one in the pool of consolidated teachers was qualified to fill the available teaching position" (Id., at 28a), must also be rejected as a misapprehension of the applicable standard to the facts as presented.

The Pretext Issue

The error of the trial court in misapplying the McDonnell Douglas standard solely to the discriminatory result rather than the prior adverse acts infects the remainder of the decision which addresses the pretext issue. As with the prima facie case, the trial court viewed the District's claim of a legitimate non-discriminatory reason for its acts only from the perspective of its refusal to rescind plaintiff's leave of absence. The appropriate frame of refer-

ence for weighing defendant's rationale includes the time of its initial adverse acts which occurred months earlier.

When this wider frame of reference is observed, defendant's vociferous protest that the District "declined to rescind plaintiff's leave on strictly financial grounds" [Opposition, at 5; emphasis added] acquires a distinctly hollow ring. As previously noted, plaintiff was a full time staff member at the time of defendant's prior adverse acts. In testimony defendant's witnesses admitted that salaries were in the tentative district budget prior to July and that the budget was not final until perhaps the second week of August [Tr. 280] and further that the absolute extent of the District's staffing needs remained unclear at least until August and possibly into September [Tr. 133]. Therefore, the acts directed particularly against the

plaintiff, a staff member with significant accumulated seniority and who was replaced by a white teacher with less seniority, take on an entirely different character. Whatever appeal to the unstudied eye defendant's rationale may have, a more broadly directed focus on the entire series of adverse acts reveals an attempt by the defendant to justify its acts in retrospect. Such post-hoc justification must be rejected. Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981) (Defendant's attempt to explain why plaintiff would not have been hired rejected as an explanation for failure to hire).

Moreover, plaintiff's full offer of proof, rejected by the court, reflects precisely the type of evidence anticipated by the Supreme Court for proof of pretext. In McDonnell Douglas itself, the Court stated: "[o]ther evidence that may be relevant to any showing of pretext

includes facts as to the petitioner's treatment of respondent during his prior term of employment...and petitioner's general policy and practice with respect to minority employment." McDonnell Douglas v. Green, supra, 411 U.S. at 804-05. Plaintiff in the instant case sought to introduce before the court evidence of the racial animosity of her principal as well as the experiences of other minority faculty in similar circumstances. The trial court in some instances refused to admit the evidence, while in others it rejected the evidence out of hand. Thus, the trial court stands inapposite to the very principles forwarded by the Supreme Court, and has hamstrung the plaintiff only to accuse her of failing to offer sufficient evidence to make her rebuttal case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Bruce A. Fredrickson